TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 540.

JOSHUA F. BAILEY, COLLECTOR OF INTERNAL REVENUE,
PLAINTIFF IN ERROR,

vs.

FRANK WORK AND GEORGE WOOD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 3, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 540.

JOSHUA F. BAILEY, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

FRANK WORK AND GEORGE WOOD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	2	1
Declaration	5	2
Joinder	9	3
Findings	11	4
Judgment	17	6
Bill of exceptions	19	6
Assignment of error	29	9
Citation	31	9

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Joshua F. Bailey, collector of internal revenue for the thirty-second internal-revenue district, in the city of New York, plaintiff in error, and Frank Work and George Wood, defendants in error, a manifest error hath happened, to the great damage of the said Joshua F. Bailey, collector of internal revenue for the thirty-second internal-revenue district, in the city of New York, as is said, and as appears by complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this sixth day of August, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed.

SAML. BLATCHFORD.

AUGUST 6, 1874.

(Indorsed:) United States Supreme Court. Joshua F. Bailey, collector of internal revenue, &c., plaintiff in error, vs. Frank Work and George Wood, defendants in error. Writ of error. George Bliss, U. S. attorney. Filed Aug. 8, 1874.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

2 I, Kenneth G. White, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to thirty, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Joshua F. Bailey, collector of internal revenue, plaintiff in error, vs. Frank Work et al., defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this second day of October, in the year

of our Lord one thousand eight hundred and seventy-four, and of the Independence of the said United States the ninety-ninth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

3 United States circuit court, for the southern district of New York

FRANK WORK AND GEORGE WOOD
vs.
JOSHUA F. BAILEY, COLLECTOR OF INTERNAL revenue for the thirty-second internal-revenue district, in the city of New York.

Pleas in the circuit court of the United States for the southern district of New York, in the second circuit, of the term of October, 1869, to wit, on the 7th day of March, 1870.

Witness the Hon. Lewis B. Woodruff, circuit judge.

KENNETH G. WHITE, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 7th day of March, 1870, in the circuit court of the United States of America for the southern district of New York, came Frank Work and George Wood, by Charles D. Burrill, their attorney, and brought into the said court their certain declaration against Joshua F. Bailey, collector of internal revenue for the thirty-second internal-revenue district in the city of New York, being in custody, &c., of a plea of trespass on the case upon
4 the premises, and which declaration follows in these words, that is to say:

5 United States circuit court.

FRANK WORK AND GEORGE WOOD
against
JOSHUA F. BAILEY, COLLECTOR OF INTERNAL revenue for the thirty-second internal-revenue district, in the city of New York.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs come here into court, and by Charles D. Burrill, their attorney, suggest and give this court now here to understand and be informed that heretofore, to wit, on the second day of March last past, an action was commenced in the supreme court of the State of New York, according to the laws of said State, and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiffs against the defendant herein, upon and for the same cause of action hereinafter set forth; and the summons therein was filed in the clerk's office of the said supreme court. That the defendant afterwards, by his attorney, duly appeared in said action, and such proceedings were thereupon had that, afterwards, on
6 the seventh day of March, in the year of our Lord one thousand eight hundred and seventy, the said action was, in due form of law, removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such case made and provided, and the clerk of the said supreme court did thereupon return the said writ, with the summons aforesaid, and did file the same in this court,

according to the course and practice of this court; which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs accordingly, by their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant, on or about the second day of March, one thousand eight hundred and seventy, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of thirteen thousand dollars, lawful money of the
7 United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of said defendant, and for other money by said plaintiffs before that paid, laid out, and expended for the said defendant, at the request of said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs.

And being so indebted the said defendant, in consideration thereof, afterward, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this court mentioned, when the defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterward, to wit, on the same day and year, and at the place aforesaid, accounted, together with the said plaintiffs, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaint-
8 iffs, and then and there being in arrear and unpaid; and, upon such accounting, the said defendant then and there was found indebted to the said plaintiffs in the further sum of thirteen thousand dollars of lawful money as aforesaid; and being found so in arrear and indebted to the said plaintiffs, the said defendant, in consideration thereof, afterward, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when said defendant should be afterward thereunto requested; nevertheless, the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them or any part thereof, to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the plaintiff of thirteen thousand dollars; and thereof the plaintiffs bring suit, and so forth.

CHARLES D. BURRILL,
Attorney for Plaintiffs.

9 U. S. circuit court.

JOSHUA F. BAILEY
ads.
FRANK WORK AND OTHERS.

And the said Joshua F. Bailey, defendant in this suit, by Edwards Pierrepont, his attorney, comes and defends the wrong and injury when, &c., and says that he did not undertake or promise in manner and form

as the said plaintiff hath above thereof complained against him. And of this he puts himself upon the country.

(And the said plaintiff doth the like, &c.)

EDWARDS PIERREPONT,
U. S. Atty.

Therefore the issues above joined were ordered to be tried at a circuit court appointed to be held at the court-house, in the city of New York, in and for the circuit aforesaid, on the first Monday of April, 1870; at which day and place the parties appeared, by their respective attorneys, but the issues were not tried, and the same were continued until
10 the first Monday of April, 1874, at the place last aforesaid, at which day and place last above mentioned before the honorable Lewis B. Woodruff, circuit judge, came the parties aforesaid, by their attorneys above mentioned, and thereupon the said parties did, by their said attorneys, in open court, waive a jury and consent that the issues hereinbefore joined might be tried and determined by the court, without the intervention of a jury, and did, then and there, file a stipulation in writing with the clerk of the court to that effect.

That in pursuance of the said stipulation so filed, the said issues came on to be tried before the honorable Lewis B. Woodruff, circuit judge aforesaid, without a jury, on the sixteenth day of April, 1874, at the court-house in the city of New York, and thereupon the said circuit judge, having heard the allegations and proofs submitted by the respective parties, did render his findings and decision upon the issues aforesaid; which said findings were duly filed with the clerk of the said circuit court at the city of New York, and are in the words and figures following, to wit:

11 United States circuit court for the southern district of New York.

FRANK WORK AND GEORGE WOOD
vs.
JOSHUA F. BAILEY, COLLECTOR OF INTERNAL revenue for the thirty-second internal-revenue district, in the city of New York.

This action was brought to trial at a circuit court of the United States, held in and for the southern district of New York, at the city of New York, on the 16th day of April, 1874, before the honorable Lewis B. Woodruff, circuit judge, who, having heard the allegations and proofs submitted by the respective parties, doth, on said proofs and the admissions made upon the trial by the respective parties, find and decide as follows:

First. That at the several times hereinafter mentioned, and at the time of the commencement of this action, the plaintiffs were partners in the city of New York, under the name of Frank Work and Company, and as such were engaged in buying and selling, and negotiating
12 purchases and sales of stocks, bonds, and other moneyed securities, for others, for a commission, upon being secured against loss by a pledge of a percentage in money or other property; advancing the purchase-money of such stocks, and holding, or "carrying" the same until directed to make sale thereof; and that at the time of the payment by the plaintiffs to the defendant of the several sums of money hereinafter mentioned, said defendant was the collector of internal revenue for the thirty-second internal-revenue district, in the city of New York.

Second. That at various times between the first of April, 1869, and the first of February, 1870, the assessor of internal revenue of the United States for the district aforesaid, claimed and insisted that the said plaintiffs were bankers, and liable, as such, to pay a tax upon the amount of capital employed by them in their business; and said assessor also insisted that all moneys borrowed from time to time, and temporarily by said plaintiffs, in the ordinary and usual course of their business, was capital employed in the business of banking, and liable to be assessed as such, and that plaintiffs were liable to pay a tax
13 thereon at the rate of one-twenty-fourth of one per cent. upon the average amount of moneys so borrowed, as aforesaid, during each and every month.

Third. That the said plaintiffs objected, and protested that such moneys so borrowed and used by them in the course of their business were not capital employed in the business of banking, and that they were not liable to make return thereof, or to pay tax thereon; but the said objection and protest were overruled, and said plaintiffs were compelled to make a return to said assessor of all moneys so borrowed by them as aforesaid; and that the said assessor did thereupon assess said moneys as capital employed in the business of banking, and did assess and levy a tax at the rate of one twenty-fourth of one per cent. for each and every month thereon.

Fourth. That the amounts of money so borrowed by said plaintiffs as aforesaid, and so assessed by said assessor, as capital employed in the business of banking, during each and every month of the period aforesaid, and the tax of one twenty-fourth of one per cent. thereon,
14 assessed and levied by said assessor, as hereinbefore stated, are as follows, that is to say: During the month of April, 1869, $1.374,200, on which the tax assessed at the said rate was 572.58; during the month of May, 1869, 1,676,550, on which the tax assessed at the said rate, was 698.56; during the month of June, 1869, 1,850,000, on which the tax assessed at the said rate, was 770.80; during the month of July, 1869, 2.310,072, on which the tax assessed at the said rate, was 962.53; during the month of August, 1869, 1,762,000, on which the tax assessed at the said rate, was 734.16; during the month of September, 1869, 1,977,000, on which the tax assessed at the said rate, was 823.75; during the month of October, 1869, 1,502,300, on which the tax assessed at the said rate, was 625.59; during the month of November, 1869, 1,190,000, on which the tax assessed at the said rate, was 495.83; during the month of December, 1869, 1,217,000, on which the tax assessed at the said rate was 507.08; during the month of January, 1870, 1.131,984, on which the tax assessed at the said rate was 471.66.

Fifth. That the said defendant, so being such collector as aforesaid, levied and collected from said plaintiffs, and compelled them to pay, against their will, the said several amounts so assessed as taxes as last aforesaid, at the dates, and in the amounts hereinafter stated,
15 that is to say, on July 9th, 1869, $572.58 and $698.54; on August 31st, 1869, $1,774.99; on October 1st, 1869, $754.99; on October 26th, 1869, $844.58; on December 27th, 1869, $516.66; on January 29th, 1870, $527.91; and on February 25th, 1870, $646.78 and $492.49; and that said several amounts were paid by said plaintiffs to the said defendant on the said several days, against their will; and at the time of said payments, respectively, the said plaintiffs did protest against the legality of said assessment, and their liability to be assessed in respect thereto, or to pay said tax thereon, and claimed that such mon-

eys so borrowed from time to time, and temporarily, as aforesaid, and so included in and assessed as a part of their capital, were not capital employed in the business of banking, and were not liable to such assessment or tax.

Sixth. That the sums so paid as last aforesaid, with the interest thereon from the time of such payments, respectively, to the day of the date of this decision, amount to nine thousand and forty-one dollars and four cents.

Seventh. That prior to the commencement of this action, an
16 appeal was duly taken on the part of the said plaintiffs to the Commissioner of Internal Revenue from the action and decision of the assessor as aforesaid, and that all the preliminary steps required by law to be taken by the plaintiff, before the commencement of this action, were taken by them; and that this action was brought within the time limited by law, after the decision of such Commissioner upon said appeal.

And from the foregoing facts the said justice doth find and decide as follows:

First. That the money borrowed from time to time, and temporarily by the said plaintiffs, in the ordinary and usual course of business, was not capital employed in the business of banking, and that the said plaintiffs were not liable to be assessed for or in respect to said moneys as a part of their said capital; and that the assessment so made, and the tax of one twenty-fourth of one per cent. levied thereon as aforesaid, and the collection of said tax by said defendant, were illegal and unauthorized, and that the payment of said sums by said plaintiffs at the times
17 hereinbefore stated, was involuntary, and made under compulsion.

Second. That the plaintiffs are entitled to recover against the said defendant the amounts so paid by them for or on account of said tax, so illegally assessed as aforesaid, which amounts, with interest as hereinbefore stated, amount to the sum of nine thousand and forty-one dollars and four cents.

Therefore it is considered that the said plaintiffs do recover against the said defendant their damages to the amount so awarded as last aforesaid, to wit, nine thousand and forty-one dollars and four cents, and also one hundred and four dollars and ninety-five cents, for their costs and charges by the said court now here adjudged to the said plaintiffs; which said damages, costs, and charges, in whole, amount to nine thousand one hundred and forty-five dollars and ninety-nine cents.

Judgment signed this 5th day of August, 1874.

KENNETH G. WHITE, *Clerk.*

18 (Endorsed:) U. S. circuit court, S. D. of N. Y. Frank Work et al. vs. Joshua F. Bailey, collector, &c., for the 32d int. rev. dist., in the city of New York. Judgment-roll. Charles D. Barrill, atty. for plaintiffs. Filed Aug. 5th, 1874.

19 U. S. circuit court.

FRANK WORK & GEORGE WOOD
vs.
JOSHUA F. BAILEY, COLLECTOR, &C. } Bill of exceptions.

This cause came on for trial at the April term of the United States circuit court for the southern district of New York, in the second circuit, to wit, on the 16th and 17th days of April in the year 1874, before

the honorable Lewis B. Woodruff, the circuit judge, a jury having been duly waived by the respective parties, pursuant to the act of Congress.

Witnesses were examined on the part of the plaintiffs, and cross-examined on the part of the defendant. The court found the facts set forth in the findings hereinafter stated.

Thereupon defendant's counsel moved the court, on the facts so
20 found, that judgment be entered for defendant, and plaintiffs' counsel moved that judgment be entered for plaintiffs. After argument and due deliberation, the court denied said motion of defendant's counsel, and defendant's counsel duly excepted.

The court then directed judgment to be entered for the plaintiffs; to which direction defendant's counsel duly excepted.

The decision of the court refusing judgment for defendant and directing judgment for the plaintiffs, and the said findings of fact filed by the court upon the conclusion of said trial, are as follows:

21 First. That at the several times hereinafter mentioned, & at the time of the commencement of this action, the plaintiffs were partners in the city of New York, under the name of Frank Work & Company, and as such were engaged in buying and selling and negotiating purchases and sales of stock, bonds, and other moneyed securities, for others, for a commission; and upon being secured against loss by a pledge of a percentage in money or other property, advancing the purchase-money of such stocks, & holding or "carrying" the same until directed to make sale thereof; and that at the time of the payment by the plaintiffs to the defendant of the several sums of money hereinafter mentioned, said defendant was the collector of internal revenue for the thirty-second internal-revenue district in the city of New York. That the place of business of the defendants was, at the several times hereinafter mentioned, situated in the thirty-second collection-district of the State of New York.

Second. That at various times between the 1st of April, 1869, and the 1st of February, 1870, the assessor of internal revenue of the United States for the district aforesaid claimed and insisted that the said plaintiffs were bankers, and liable, as such, to pay a tax upon the
22 amount of capital employed by them in their business; and said assessor also insisted that all moneys borrowed, from time to time and temporarily, by said plaintiffs, in the ordinary and usual course of their business, was capital employed in the business of banking, and liable to be assessed as such, and that plaintiffs were liable to pay a tax thereon, at the rate of one twenty-fourth of one per cent. upon the average amount of moneys so borrowed as aforesaid during each and every month.

Third. That the said plaintiffs objected and protested that such moneys so borrowed and used by them in the course of their business were not capital employed in the business of banking, and that they were not liable to make return thereof, or to pay tax thereon, but the said objection and protest were overruled, and said plaintiffs were compelled to make a return to said assessor of all moneys so borrowed by them as aforesaid; and that the said assessor did thereupon assess said
23 moneys as capital employed in the business of banking, and did assess and levy a tax at the rate of one twenty-fourth of one per cent. for each and every month thereon, and duly transmitted the assessment-roll containing said assessment to the defendant.

Fourth. That the amounts of money so borrowed by said plaintiffs as aforesaid, and so assessed by said assessor as capital employed in the business of banking, during each and every month of the period aforesaid,

exclusive of the amount thereof invested in the bonds and securities issued by the Government of the United States, and the tax of one twenty-fourth of one per cent. thereon assessed and levied by said assessor, as hereinbefore stated, are as follows, that is to say:

During the month of April, 1869, $1,374,200, on which the tax assessed at said rate was $572.58; during the month of May, 1869,
24 $1,676,550, on which the tax assessed at said rate was $698.56; during the month of June, 1869, $1,850,000, on which the tax assessed at said rate was $770.80; during the month of July, 1869, $2,310,072, on which the tax assessed at said rate was $962.53; during the month of August, 1869, 1,762,000, on which the tax assessed at said rate was $734.16; during the month of Sept., 1869, 1,977,000, on which the tax assessed at said rate was $823.75; during the month of October, 1869, 1,502,300, on which the tax assessed at said rate was $625.95; during the month of November, 1869, 1,190,000, on which the tax assessed at said rate was 495,83; during the month of Decem'r, 1869, 1,217,000, on which the tax assessed at said rate was 507.08; during the month of January, 1870, 1,131,984, on which the tax assessed at said rate was 471.66.

Fifth. That the said defendant, so being such collector, as
25 aforesaid, levied & collected from said plaintiffs, and compelled them to pay, against their will, the said several amounts so assessed as taxes, as last aforesaid, at the dates and in the amounts hereinafter stated, that is to say: On July 9th, 1869, $572.58 and $698.54; on August 31st, 1869, $1,774.99; on October 1st, 1869, $754.99; on October 26, 1869, $844.58; on December 27th, 1869, $516.66; on January 29, 1870, $527.91; and on February 25th, 1870, $646.78 and $492.49; and that said several amounts were paid by said plaintiffs to the said defendant on the said several days, against their will; and at the time of said payments, respectively, the said plaintiffs did protest against the legality of said assessment, and their liability to be assessed in respect thereto, or to pay said tax thereon, and claimed that such moneys, so borrowed, from time to time and temporarily, as aforesaid, and so included in and assessed as a part of their capital, was not capital employed the business of banking, and was not liable to such assessment or tax.

Sixth. That the sums so paid, as last aforesaid, with the interest thereon, from the time of such payments, respectively, to the day
26 of the date of this decision, amount to nine thousand and forty-one dollars and four cents.

Seventh. That prior to the commencement of this action, an appeal was duly taken on the part of the said plaintiffs to the Commission' of Internal Revenue, from the action and decision of the assessor aforesaid, and that all the preliminary steps required by law to be taken by the plaintiffs before the commencement of this action, were taken by them; and that this action was brought within the time limited by law, after the decision of such Commissioner upon said appeal.

And from the foregoing facts the said justice doth find and decide as follows:

First. That the money borrowed from time to time, and temporarily, by the said plaintiffs, in the ordinary and usual course of their business, was not capital employed in the business of banking, and that the said plaintiffs were not liable to be assessed for or in respect to said
27 moneys as a part of their said capital; and that the assessment so made, and the tax of one twenty-fourth of one per cent., levied thereon as aforesaid, and the collection of said tax by said defendant, were illegal and unauthorized, and that the payment of said sums by

said plaintiffs, at the times hereinbefore stated, was involuntary and made under compulsion.

Second. That the plaintiffs are entitled to recover against the said defendant the amounts so paid by them for or on account of said tax, so illegally assessed as aforesaid, which amounts, with interest, as hereinbefore stated, amount to the sum of nine thousand and forty-one dollars and four cents.

(Signed) LEWIS B. WOODRUFF,
Circuit Judge.

28 And inasmuch as the aforesaid several matters of fact and of law do not appear by the records of said trial and judgment, therefore on the prayer of the said defendant, by his counsel, the said judge has signed and sealed this bill of exceptions, this 30th day of September, 1874, as yet of said April term.

(Signed) L. B. WOODRUFF. [L. S.]

(Endorsed:) U. S. circuit court. Frank Work et al. agst. Joshua F. Bailey. Bill of exceptions. George Bliss, deft.'s atty. Filed Oct. 1, 1874.

29 U. S. circuit court.

FRANK WORK ET ALS. *vs.* JOSHUA F. BAILEY. } Assignment in error.

And now the Joshua F. Bailey, by George Bliss, his attorney, says, that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the said record aforesaid it appears that the judgment aforesaid given was given for the said Frank Work et als. against the said Joshua F. Bailey, whereas by the law of the land the said judgment ought to have been given for the said Joshua F. Bailey against the said Frank Work et als. And the said Joshua F. Bailey prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by reason of the said judgment.

GEORGE BLISS,
Atty. or Bailey, Plff. in Error.

30 (Endorsed:) U. S. circuit court. Frank Work et als. vs. Joshua F. Bailey. Assignment in error. George Bliss, deft. atty. Due service of within is hereby admitted. Burrill, Davidson & Burrill, plff. atty. Filed Oct. 1, 1874.

31 UNITED STATES OF AMERICA, *ss:*

To Frank Work and George Wood, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1874, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Joshua F. Bailey, collector of internal revenue, &c., is plaintiff in error, and you are defendants in error, to show cause, if

any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, this sixth day of August, in the year of our Lord one thousand eight hundred and seventy-four.

SAM'L BLATCHFORD, *D. J.*

32 (Indorsed:) United States Supreme Court. Joshua F. Bailey, collector of internal revenue, &c., plaintiff in error, vs. Frank Work and George Wood, defendants in error. Citation. George Bliss, U. S. attorney.

Due service of the citation of which the within is a copy is hereby admitted, Aug. 8, 1874.

CHARLES D. BURRILL,
Attorney for Defendants in Error.

Filed Aug. 8, 1874.

(Indorsement on cover:) No. 540. Joshua F. Bailey, collector of internal revenue, plaintiff in error, vs. Frank Work & George Wood. S. New York C. C. U. S. Filed 3d October, 1874.

In the Supreme Court of the United States.

JOSHUA F. BAILEY, COLLECTOR, ETC., *vs.* CLARK AND OTHERS. } No. 539.

SAME *vs.* WORK & WOOD. } No. 540.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, AT THE APRIL TERM, 1874.

Brief for the collector.

In the Supreme Court of the United States.

JOSHUA F. BAILEY, COLLECTOR, &c., *vs.* CLARK AND OTHERS. } No. 539.

SAME *vs.* WORK & WOOD. } No. 540.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, AT APRIL TERM, 1874.

Brief for the collector.

The facts in the above cases are substantially the same.

The suits were brought to recover money paid to the collector, by compulsion, as a tax of $\frac{1}{24}$ of 1 per cent. upon capital employed in banking.

The business of Clark and his partners is found (No. 539, fol. 11) to have been *banking*.

The business of Work & Wood is described (No. 540, fol. 12) in terms which we submit amount to a finding that it was *banking*, viz: "were engaged in buying and selling and negotiating purchases and sales of stocks,

bonds, and other moneyed securities for others for a commission, and, upon being secured against loss by a pledge of a percentage in money or other property, advancing the purchase-money of such stocks, and holding or 'carrying' the same until directed to make sale thereof."

The internal-revenue act of 1866 (ch. 184, sec. 9) applies the term *bankers* to those, among others, *who have a place of business * * where money is advanced or loaned on stocks, &c., or where stocks, &c., are received for sale.* (14 Stat., 115.)

The description of the *business* in No. 540, then, corresponds with the statutory definition of *banking.*

The fund upon which the tax complained of was levied as *capital*, was—"all moneys borrowed, from time to time, and temporarily, by said plaintiffs (bankers) in the ordinary and usual course of their business."

The act (1866, ch. 184, sec. 9,) relied upon as justifying the levy, provided "that there shall be levied, collected, and paid a tax of $\frac{1}{24}$ of 1 per centum each month upon the average amount of the deposits of money subject to payment by check or draft, as represented by certificates of deposit or otherwise, whether payable on demand or at some future day, with any person, bank, association, or company engaged in the business of banking; and a tax of $\frac{1}{24}$ of 1 per centum each month, as aforesaid, upon the capital of any bank," &c. (14 Stat., 136.)

We assign for error the failure of the court below to decide that the fund was liable to the tax levied, if not as *capital*, yet as *deposits.*

As the absence of an assessment does not warrant the return of a tax, if properly collected, so we submit mere error, in the form of assessment, does not warrant the return of a tax which, when collected, was *then and there* due under a different appellation. (Dollar Savings Bank *v.* United States, 19 Wall., 227.)

Here, whether the subject-matter were "deposits" or "capital," it was equally liable to the amount of tax collected.

Upon a declaration in the common counts against a collector, and a plea of non-assumpsit, (the facts being as here,) the issue is, in substance, whether the plaintiff owed to the *defendant, in his official capacity*, for a tax, at the time when the tax was collected, the amount so taken, whether in the formal name under which its collection was made, or in some other.

While an irregular assessment, &c., may be no foundation for proceedings *thereunder* to enforce the levy, on the other hand its irregularity gives no aid to the taxpayer who seeks, *by subsequent litigation*, to dispute the validity of the imposition. The latter proceeding is *ex æquo et bono*, and is not grounded upon irregularities in the legal forms by which the defendant has come into possession of *that which is his own.*

Here, at the same time and place, and with circumstances every way similar, the bankers were (say) liable to this tax either upon "capital" or upon "deposits." It was necessary that it should be found that they had paid it upon both, before it could be recovered back as having been improperly laid. Nothing is found by the court upon this point.

Whatever may be said as to a presumption that the same subject-matter was *also properly* assessed, (*i. e.*, as

"deposits," if, indeed, there can be a presumption in favor of such *double charge*,) it is enough to say that the tribunal which passed upon the facts has made no finding in conformity thereto.

Therefore,

1. The fund was "deposits" within the meaning of the above act.

It was an amount of money *placed* with bankers, "represented by certificates of deposit *or otherwise*."

In order to impose a tax upon the peculiar profits of bankers, it was necessary to tax not only their capital, but all sums of money which go into their business and become *quasi* capital. Among the latter are "general deposits," and it obviously makes no difference how the contract of deposit (except in some savings-banks, &c.) is evidenced. The words "deposits" and "otherwise," in the act quoted above, are used in their most comprehensive sense. Inasmuch as money borrowed by bankers is generally borrowed by simple deposit, the word *deposits* is used to signify all sorts of borrowing. It cannot be that, by changing the form only of the deposit, the tax can be evaded.

Certificates of deposit "have been held to be in fact equivalent to promissory notes. * * * If they are payable at a future day certain, they are simply promissory notes, neither more nor less." (Morse on Banking, [1870,] 53.)

2. Again, we submit that the amount of money which a banker can employ at any particular time in his business is his *capital* at such time. As definite calculations upon the extent of his business require for their certainty the *average* of such amount over a length of time, this is required in the statute before us, and was followed

in the assessment. It is none the less capital because borrowed. "Borrowed capital" is a phrase well understood, and, indeed, constitutes perhaps the greater part of active capital. It is none the less capital because *temporarily* borrowed. That difference is met by the provision for *average* amounts.

GEO. H. WILLIAMS,
Attorney-General.
S. F. PHILLIPS,
Solicitor-General.

Supreme Court

OF THE UNITED STATES.

JOSHUA F. BAILEY, Collector, &c.,
Plaintiff in Error,

vs.

FRANK WORK & CO.,
Defendants in Error.

540.

DECEMBER TERM, 1874

BRIEF

FOR DEFENDANTS IN ERROR.

JOHN E. BURRILL,
Of Counsel.

NEW YORK:
DOUGLAS TAYLOR, LAW, BOOK AND JOB PRINTER,
Commercial Advertiser Building, cor. Fulton and Nassau Sts.

1875.

Supreme Court

OF THE UNITED STATES.

No. 540.

DECEMBER TERM, 1874.

JOSHUA F. BAILEY, Collector of Internal Revenue for the 32d Internal Revenue District in the City of New York,
Plaintiff in Error,

vs.

FRANK WORK & GEORGE WOOD,
Defendants in Error.

Brief on behalf of Defendants in Error.

This action was tried at the same time with the case of Clark, Dodge & Co. against the same defendant, and resulted in a judgment in favor of Frank Work & Company, for $9,041.04.

The trial was had before Justice Woodruff, at a Circuit Court, held in the City of New York, without a jury, and the facts found by the Court, and its

conclusions of law, are separately stated in accordance with the 4th section of the Act of March 3d, 1865, 113 U. S. Stat. at Large, page 501.

So far as respects the question whether moneys borrowed from time to time were taxable as capital, the facts and decisions in the two cases were alike and on that question this case is submitted on the brief filed in the case of Clark, Dodge & Co.

The present case, however, involves a point which does not arise in the Clark, Dodge & Co. case, and which will be the only one considered in this brief.

In the other case it was assumed for the purposes of the trial that Clark, Dodge & Co. were bankers within the meaning of the Internal Revenue Act, and the Court so found.

In the present case of Frank Work & Co. the Court found the facts specially in relation to the business conducted by them, and we claim that on those facts they are brokers, and not bankers. If, as claimed by us, that firm are brokers, and not bankers, and not liable to be assessed or taxed as such, they were of course entitled to recover against the collector independently of the question whether moneys borrowed from time to time, and temporarily, in the course of business, is capital, and taxable as such.

If the Court affirm the judgment in Clark, Dodge & Co. case, this judgment will also be affirmed; but if, on the other hand, the Court should reverse the judgment in the Clark, Dodge & Co. case, the judgment in this case should still be affirmed, on the ground that Frank Work & Co. were not bankers within the meaning of the Internal Revenue Act,

and this is the question, and the only question, we propose to consider.

The facts found by the Court are as follows:

"That * * * the plaintiffs were partners in the City of New York, under the firm name of Frank Work & Company, and as such were engaged in buying and selling and negotiating purchases and sales of stocks, bonds and other moneyed securities, for others, for a commission; and upon being secured against loss by a pledge of a percentage, in money or other property, advancing the purchase money of such stocks, &c., holding or 'carrying' the same until directed to make sale thereof."

POINTS.

First.—The business of the plaintiff, as found by the Court, comes directly within the provisions of the 9th sub. of Section 79 of the Act of June 30th, 1864, as amended by the Act of July 13th, 1866 (14 U. S. Stat. at Large, page 116). That section is in these words: "Brokers shall pay fifty dollars. Every person, firm or company, whose business it is to negotiate purchases or sales of stocks, bonds, exchange, bullion, coined money, bank-notes, promissory-notes, or other securities, for themselves or others, shall be regarded as a broker. *Provided*, That any person having paid the special tax as a banker, shall not be required to pay the special tax as a broker." According to the finding, Work & Co., in the transactions re-

ferred to, acted for others, and not for themselves; they bought and sold and negotiated sales and purchases for others, and therefore had no interest in the result of the business—not being entitled to receive any of the profits, or liable for any of the losses resulting from the transaction.

The main and principal object sought to be secured by such transaction, is a profit to the principal, and this profit can be realized only either by a purchase at a low price, and a sale at a higher price, or, as sometimes is the case, the customer contracts to sell the property, not owning it at the time, and in the expectation of being able to obtain it before the time fixed for delivery, at a lesser price than that at which it was sold, and in this latter case, if compelled to deliver, the seller borrows the property, so as to make the delivery, and keep the loan outstanding until the property so borrowed can be returned. The services of the broker are called into requisition, and are necessary for the purpose of buying and selling the property. As incident to this, he undertakes to "carry" the property until directed to sell or otherwise dispose of the same. In making the purchase or sale of the property, it occasionally happens that the broker advances money in the first instance for such purchase, and receives, as security against any loss which may result from a depreciation in the market value of the property, a percentage of its value, either in money or its equivalent; but, under no circumstances, can the broker have any interest in the transaction,

beyond the commission to which he is entitled for buying and selling the property.

Second.—It is claimed by the Government that because the broker, in the course of the transactions, and as part thereof, in some cases furnishes a part of the money to pay for the stock, and holds the stock as security for the money owing to him, the transaction becomes "banking," and the broker is converted into a banker.

This proposition we deny for the following reasons:

1. In the first place, the business carried on by stock brokers, and its peculiar features, were well known to and fully understood by Congress at the time of the passage of the several Internal Revenue Acts, and Congress must be presumed to have legislated with reference to the peculiar nature of such business, and the manner in which it was conducted.

   The legislation in question was directed principally to the stock brokerage business as conducted in the large commercial centres, where such business is almost exclusively carried on, and from which business such large revenues were secured to the Government by taxation.

   There had been previously to the passage of such Act much litigation between stock brokers and those by whom they were employed, in which the peculiar features of their

business had been examined, and the relations of broker to customer considered and defined.

Northrop *v.* Shook, 10 Blatchf., page 249; Opinion of Justice Woodruff.

2. In construing the Acts in question, the Court should consider the mode and manner in which the several branches of business (subject to taxation) were at the time usually and ordinarily conducted. When the Act authorizes a particular class of persons to do a particular business, on paying a license fee or special tax, it must be assumed that Congress intended, in the absence of any express provision, that such persons should be at liberty to conduct that business in the usual and ordinary way. When Congress therefore authorized the class of persons known as brokers to negotiate and make sales of stocks, &c., it must be presumed that they were authorized to make such sales in the ordinary mode, and to do everything usually and customarily done in making such sales, and in completing the transaction.

3. This is illustrated by the language of the 9th subdivision of the 79th section, Act of March 3, 1865 (13 U. S. Stat. at Large, p. 472), which amended the same section of June 30, 1864 (13 U. S. Stat. at Large, page 252), which defines brokers as those who negotiate sales for *themselves* or others. If these words are construed strictly, there is a clear inconsistency between the words "negotiate" and

"for themselves." If negotiating is merely the conduct of transactions as a middle man, or go-between, in which the negotiator has or can have no personal interest, then it is clear that he cannot, strictly speaking, negotiate a sale or transaction "for himself." Congress knew well that brokers in stocks not only acted as simple brokers, but also that they were in some instances themselves interested in the transaction, but that notwithstanding, they were still considered and treated as brokers. So again by the 99th section of the same Act, (*Ibid*, p. 273,) all brokers are compelled to pay taxes on all sales of stock made by them, so that it is very clear that they were authorized to make sales, and that their business was not strictly that of "negotiating."

This section, in connection with the 9th Sub. of 79th Section, was construed by this Court as requiring brokers to pay taxes on all sales, whether made for others or on their own account.

U. S. *v.* Cutting, 3 Wallace, 441.

U. S. *v.* Fisk, *Ib.*, 445.

It necessarily follows, therefore, that under the 9th subd. of § 79, persons coming within the class therein designated as brokers are not confined to "negotiation" pure and simple of sales or purchases of stock, &c., but that, under the license issued to them as brokers, and in consideration of the special tax paid for such license, they have a right to buy and sell stocks, &c., on their own ac-

count, on the further condition that they shall pay the Government a tax on *all such sales.*

Now, this is a part of the business of bankers, as defined by the 1st subd. of 79th section. We say a part of—and it is in reference to this part of the business—that is, the purchase and sale of stock—that the business of bankers and of brokers coincide; and for this reason, it was provided that those who were licensed as bankers, and who paid a special tax for the privilege of acting as bankers, were permitted to transact this business of buying and selling stocks without paying the license fee or tax exacted from brokers.

The language of the 9th subd. of the 79th section is peculiar. It will be noticed that, as amended by the Act of July 13, 1866, 14 U. S. Stat., 115, although bankers are not obliged to pay the license fee or tax exacted from brokers for doing the business therein mentioned, they are still, in respect to such transactions, deemed and considered as brokers, which shows that the business was peculiarly that of brokers.

The language is: "Every person * * whose business it is, &c., shall be regarded as a broker under this act"; and the effect of this is more apparent when it is considered that the words, "except such as hold a license as a banker," which were in the Act of June 30, 1864, were stricken out of the amended Act of July 13, 1866.

4.—Brokers are authorized to make sales for themselves, and are entitled to do everything and anything forming a part of similar transactions when conducted by other persons in regard to other property. If for the purpose of effecting a sale, or in the business of making sales of property in the usual way, the party employed makes a temporary advance upon the property, is the character of the business changed? We say not. It is an ordinary part of the business of an auctioneer (subd. 30 of 79 sec.) to made advances on the property to be sold, and they are obliged to make such advances in order to secure the sale. Do they cease to be auctioneers and become pawnbrokers under subd. 10 of 79th section, because, in the course of their ordinary business as auctioneers, they make those advances? Their business is that of auctioneers, and making of advances is an incident to it. So with a commission merchant, called in the act a wholesale dealer, in subd. 2 of sec. 79, it is, and always has been, a part of his business to make advances on property consigned to him. Does he cease to be a commission merchant because he makes such advances, and also become a pawnbroker under subd. 10 of 79th section. It is a part of the business of factors to made advances on property and to receive and deliver the property, and in many respects to act in regard thereto as if they were the actual owners, and they come under the class of wholesale dealers mentioned in the act. Do auctioneers,

commission merchants, and factors cease to be such because, in the course of their business, they do something which, if done alone, would come within the kind of business done by pawnbrokers, or by some other class of persons? We say not.

5.—In defining bankers in subd. 1 of sec. 79, the language is having "a place of business," where such and such things are done; and in subd. 9 of same section, speaking of brokers, it says, "Every person * * * whose business it is;" thus showing that the class to which an individual was to be assigned was to be determined by the general nature of the business done by him. If his business is that of a broker, he is entitled to do every thing which fairly comes withing the scope of that business.

Third.—It is very clear that the business of a broker and that of a banker are not the same, because the business of each is stated in separate sections of the act, and because the act (sec. 99, 13 U. S. Stat., 273) contemplates and provides for the case of a banker doing business as a broker. The fact that no allusion is made to a broker doing business as a banker shows that the business of the former is merged in the latter, on the principle that the greater includes the less. The question then recurs, under what circumstances is a banker acting

as a broker?—when may it be said within the meaning of the act that the banker is doing business *as a broker?* We say it can only be when the banker is doing the business which brokers are authorized to do by the 9th subd. of 79th sec. Congress acted on the theory that the business mentioned in the 9th subd. was incidental to and might be a necessary part of the business of a banker; and it, therefore, provided that a person who had taken out a licence as a banker might transact the business of a broker. And although, as Judge Nelson said in Clark *vs.* Gilbert, *infra*, brokers are entitled to prosecute their particular business to its practical and useful results, still the business is, and remains for the purpose of the act, that of broker. Again, if the business of broker, as defined by the 9th subd., was a part of the business of bankers, it is clear that bankers, in doing that business, would not act as brokers, but as bankers, and in that event there would be no meaning in the words "bankers doing business as brokers." In order to give these words any meaning, we must hold that the business of the broker may be carried on by the banker as an incident to that of the latter; but that the broker's business does not become that of banker, merely because it may be embraced in the 1st subd., or may be carried on by bankers. The intention of the Legislature to treat this business as that of broker, and to treat all persons, whether bankers or not, while engaged in it, as brokers, is shown by the amendment to the 9th subd. of sec. 79. The original act (13 U. S. Stat., 472) provided as

follows: "Every person, &c., * except such as hold a license as a banker, * * shall be regarded as a broker." Under that, although a banker was authorized to do the business, &c., he was not a broker within the act.

The amendment (14 U. S. Stat., 116) struck out the words "except such as hold a license as a banker," and thus made every person, no matter who, engaged in the business therein defined a broker. The clause at the end of the paragraph, "provided that any person holding a banker's license need not take out a license as a broker," illustrates the idea more clearly, because it gave bankers the right to do that business without extra duty; but at the same time declared them to be brokers within the act.

Fourth.—It has been twice decided in the Federal Courts, that in respect to the purchase and sale of stocks under the precise state of facts found by the Court in the present case, the parties employed act as mere agents and brokers, and that their relations to their principal and the nature of the business and the character in which they act are not changed or affected by the fact that in the course of, and as a part of such transaction, money is advanced by the broker, and that he assumes personal responsibility.

Clark *v.* Gilbert, 5 Blatchf., 330.

Northrop *v.* Shook, 10 *Ib.*, 243.

In the first of these cases, Justice Nelson de-

cided in so many words, that the business of buying and selling, and carrying stocks on commission, was the business of *brokers*, and not that of bankers, as defined by the Revenue Law. At the time of the transactions out of which that case arose, the 99th Section of the Act of June, 30, 1864, (13 U. S. Statutes at Large, 273), imposed a tax upon "brokers and bankers doing business of brokers," of one-twentieth of one per cent. monthly on all sales of stocks, bonds, &c., and the question in that case was whether the plaintiffs, in carrying on such business, were to be regarded as bankers or as brokers, and the Court, on page 333, after stating the nature of the business of the plaintiffs in that case, and which was the same as that found by the Court to be carried on by Frank Work & Co., said:

"This business is not only outside of the business of a banker, as defined by the Act, but comes directly within that of a broker, and is subject to a tax under the 99th Section."

The language of the opinion in that case is as follows: "The case of the plaintiffs, which is set forth in the 4th paragraph of the bill, is, in substance, that in carrying on their business as bankers, they purchase stocks, bonds, &c., for others, but make the purchases in their own name, and advance their own money, and take the transfers in their own name, and hold the stocks as security for re-payment of the money by the persons for whom the stocks were purchased, and on receiving such repayment with interest and the customary charges, deliver the stocks, bonds, &c., as per agreement, or in de-

fault of re-payment sell the same to reimburse themselves. This business is not only outside the business of a banker as defined by the Act, but comes directly within that of a broker, and and is subject to the tax under the 99th Section."

It will be seen that when the tax was upon the broker, and the banker was exempted, it was held that such transactions were part of the business of a broker, and that a tax was payable thereon; and now, when the exemption is in favor of the broker, it is claimed by the Government that the transaction is one of banking, and that the parties who were held by the case referred to, to be brokers, and taxed as such, are now, in respect to the same class of transactions, to be treated as bankers, and taxed as such.

The same Court (Justice Woodruff), delivering the opinion in the case of "Northrup *v.* Shook, 10 Blatchford, 243," decided that a person who was engaged in purchasing and carrying stocks in the manner in which Work & Co. did their business, and had no interest in the transaction, except his commissions and interest, or interest and commission on his advances, the whole being at the risk and for the account of the customer as to profit or loss, did business as a broker within the Revenue Laws, and that his sales were subject to the duties imposed by the 99th Section of the Act of June 30th, 1864, which imposed a tax upon brokers in respect to the business done by them as such, and, in so doing, adopted the principle laid down in "Clark *v.* Gilbert," *supra.*

The opinion of Justice Woodruff, on pages 251 to 254 of 10 Blatchford, is so full, and so thoroughly discusses the question here involved, that it would be a waste of time to add anything to what has been so well said.

The attention of the Court is called particularly to the portions of the opinion on pages 250 to 254.

Fifth.—We insist further, that the furnishing of the money by the plaintiffs in the course of such transactions, on the security of stock, is incident to the business of purchasing and carrying stocks, and that the character of the business is to be determined with reference to the main and principal features of it; and that if such business would, in the absence of any loan or advance by the plaintiffs on the stock, be regarded as the business of brokers, it is not converted into that of bankers by the mere fact that, in conducting it, it is necessary that the broker should make a loan upon the stock.

The main and principal object to be secured in such transactions is the purchase by the broker of the stock, and the sale of it for the benefit of the customer, so as to realize for himself commissions on the purchase and on the sale, and as great a profit as could, under the circumstances, be had for the benefit of the principal; and whatever was necessarily or usually incident to such business, might and

could be done in connection with it, without changing its character.

On the principle laid down by Justice Nelson in "Clark *vs.* Gilbert," 5 Blatchford, 330, that a banker was empowered to carry on the business authorized to be done by him under his license to its practical and useful results, so brokers, when engaged in the purchase and sale of stocks for others, are also empowered to conduct the particular business transacted by them so as to reach the practical and useful results contemplated by the parties at the time of their employment, without changing the character in which they acted.

Again, the distinction between bankers and brokers, and the business to be done by them, is clearly recognized. The business of bankers is presented by subd. 1 of section 79, and the business of brokers is defined by subd. 9 of the same section. But the latter subdivision, as amended by the Act of March 3rd, 1865, 13 U. S. Stat. [472] reads as follows: "Brokers shall pay $50 for each license. Every person, firm or company, *except such as hold a license as a banker*, whose business it is as a broker to negotiate purchases or sales of stocks, shall be regarded as a broker." Under that law a banker, although doing the business which a broker was authorized to do, was not regarded or treated as a broker. But by the Act of July 13th, 1866, [14 U. S. Stat.] 116, the words "except such as hold a license as a banker," were omitted, and the section as amended reads that, "Every person whose business it is to negotiate purchases or sales shall be regarded as a

broker." This business was specially set apart as the proper and peculiar business of brokers, and the tax paid by brokers was so paid in respect to such business.

The 99th Section of the Act, June 30th, 1864, provided that all "brokers and bankers doing business as brokers," shall be subject to pay the duties thereby imposed on sales of stocks, &c., showing again that the business referred to was, properly speaking, the business of brokers, and bankers were taxed in respect thereto, because they acted as brokers.

The same idea is carried out by the 99th section as amended by the Act of July 13th, 1866, 14 U. S. Statutes, 134, which provides that there shall be paid by "brokers, banks or bankers," a tax on all sales and contracts of sales of stocks, bonds, coin, notes, and other securities.

Another part of the same section provides that all persons who "act in the matter as agents or brokers, and who make sales, or contracts of sales, or receive, or deliver stock, &c., in execution thereof, when the note or memorandum is not stamped," as provided by that section, are liable to a penalty.

The Internal Revenue Act contemplates the possibility that a banker may transact the business of a broker, but there is nothing to indicate that the broker, by doing what he was authorized as "broker" to do, made himself a banker, or subjected himself to be treated and taxed as such. According to the theory of the government, it would be hard to tell in what transactions or class of transactions a banker

acts as broker. If a banker does not act as a broker in buying and selling and negotiating sales and purchases of moneyed securities, when does he act as such? It cannot be that a banker acts as broker when he is doing the business authorized to be done by the first sub-division of section 79. It must be that he can be regarded as broker only when he is doing the business authorized to be done by the 9th sub-division of the same section. If a banker becomes a broker when he does the business authorized by the 9th sub-division of section 79 just referred to, it is pretty clear that the business there authorized must be that of a broker; and equally clear that the latter, in doing it, does not become a banker. The business of buying and selling stocks, &c., for others, is, therefore, the business of a broker, and whenever bankers do that they become brokers; but brokers do not therefore become bankers.

The whole subject is thoroughly discussed in the case of Northrop *v.* Shook, 10 Blatchford, 251, *supra.*

The point contended for was also considered by Justice Nelson in Clark *v.* Gilbert, *supra*, where the Court held that although a banker might, under the law, transact not only the business of banking, but the business of a broker, and without any special license being paid therefor; still, that such banker, in regard to all the business which came within the province of a broker, was to be regarded as a broker, and liable to pay the broker's tax.

It seems fairly to follow, from the decisions above referred to:

1. That neither the business of carrying stocks, nor anything done in the course of that business, whether in the way of loans, advances, or otherwise, constitute banking business, or converts the parties into bankers.

2. That such business is the business of brokers, as defined by the Revenue Act, and that the parties conducting the same are to be considered as brokers.

Sixth.—The judgment of the Court below should be affirmed.

JOHN E. BURRILL,
Of Counsel for Defts. in Error.

Supreme Court

OF THE UNITED STATES.

JOSHUA F. BAILEY, Collector, &c.,
Plaintiff in Error,

vs.

CLARK, DODGE & CO.,
Defendants in Error.

539.

DECEMBER TERM, 1874.

BRIEF

FOR DEFENDANTS IN ERROR.

JOHN E. BURRILL,
Of Counsel.

NEW YORK:
DOUGLAS TAYLOR, LAW, BOOK AND JOB PRINTER,
Commercial Advertiser Building, cor. Fulton and Nassau Sts.

1875.

Supreme Court

OF THE UNITED STATES.

No. 539.

DECEMBER TERM, 1874.

JOSHUA F. BAILEY, Collector of Internal Revenue for the 32d Internal Revenue District in the City of New York,
Plaintiff in Error,

vs.

LUTHER C. CLARK, JOHN D. Maxwell, David Crawford, Junior, George C. Clark, and Harry E. Dodge,
Defendants in Error.

Brief on behalf of Defendants in Error.

This action was brought by Clark, Dodge & Co., the defendants in error, against the plaintiff in error, an Internal Revenue collector, to recover back moneys claimed to have been illegally assessed upon, and collected from them, as taxes upon capital employed in the business of banking.

The cause was tried before the Hon. Lewis B. Woodruff, Circuit Judge of the Second Circuit, without a jury, which was waived by consent of the parties.

The said justice rendered his decision in writing, in accordance with the statute, in which he found, and stated separately, his facts and conclusions of law.

The defendants in error made a point in the Court below, that they were not bankers within the meaning of the statute, and therefore not liable to be assessed as such, or to pay the taxes imposed upon that class of persons. They also claimed, that if they were bankers, they were to be considered as bankers doing business as "brokers," and that in respect to so much of their business as came within the definition of broker's business, they were to be regarded and treated as such by reason of that fact, they were exempted from the liability to which it was claimed they were subject.

The Court, in disposing of the questions at issue in the cause, did not pass upon either of these points, not deeming them essential to its decision; but, as will be seen by the first finding, assumed and found that Clark, Dodge & Co. were bankers, and were also doing business as brokers, in the City of New York (Case, folio 11).

The counsel for the defendants in error will be, therefore, obliged to discuss this case on the assumption that they were engaged in business as bankers.

The findings of the Court show, that between the 1st of April, 1869, and the 1st of February, 1870, Clark, Dodge & Co. made returns, as required by law, to the Assessor of the Internal Revenue, in

which returns they stated the amount of their capital employed in their business of banking (that is, their fixed capital); and, also, the amount of moneys from time to time deposited with them by their customers (Sect. 110 of Act of June 30th, 1864, 13 U. S. Statutes at Large, p. 277, as amended by Act of July 13th, 1866, 14 U. S. Statutes at Large, p. 136). That said assessor (against the objection and protest of Clark, Dodge & Co.), insisted that all moneys "*borrowed from time to time and temporarily, in the ordinary course of their business,*" formed a part of their capital employed in the business of banking, and that they were to be assessed in respect thereto at the rate of one-twenty-fourth of one per cent., and the assessor thereupon included the sums of money so borrowed, as a part of their capital employed in the business of banking; and assessed them at the rate aforesaid in respect thereto, and that the amount of tax so assessed was subsequently collected by Bailey, as Internal Revenue collector, as aforesaid, from Clark, Dodge & Co., who were compelled, against their will, to pay the several amounts so assessed as taxes. (Second and third findings, folios 12, 13, 14.)

It also appears, from the findings of the Court, that the plaintiffs below protested, in proper form, against the legality of the assessment, and their liability therefor, or to the payment of said taxes, and insisted that money so borrowed, from time to time and temporarily, as aforesaid, and so included in, and assessed as, a part of their capital, was not capital employed in the business of banking, and was not liable to such assessment or tax (folio 12).

It further also appears from the said findings, that prior to the commencement of the action, an appeal

was in due form taken on the part of the plaintiffs below to the Commissioner of Internal Revenue from the action and decision of the assessor, and that all the preliminary steps required by law to be taken by the plaintiffs below, were, in fact, taken before the commencement of the suit, and that the action was brought within the time limited by law after the decision of such Commissioner upon said appeal. (Folio 15.)

The Court below, in its first conclusion of law, held and decided that money borrowed from time to time and temporarily by said plaintiffs below, in the ordinary and usual course of their business, was not capital employed in the business of banking, and was not liable to be assessed as such, and that the assessment thereof, and tax of $\frac{1}{24}$ of one per cent. levied thereon, and the collection of said tax by the defendant, were illegal and unauthorized (folio 1). The Court also found that the moneys claimed by the plaintiffs were paid at the several times stated, and that such payment was involuntary, and made under compulsion, and that the plaintiffs were entitled to recover against the defendant the sums so paid, which amounted in the aggregate to $8,090.80 (folio 16).

The record contains nothing but the findings of the Court, and the exceptions taken to its decision. It raises no question as to the exclusion or admission of evidence, nor any exceptions taken during the progress of the trial.

All which is stated in the bill of exceptions is, that testimony was introduced on both sides, from which the Court found certain facts to exist, as set forth in the findings in the bill of exceptions.

There is no question here as to whether those findings were warranted by the evidence, because the finding of the Court is as conclusive as the verdict of a jury.

See Section 4 of the Act of March 3d, 1865, 13 U. S. Statutes at Large, 501.
Cooper *v.* Omohundro, 19 Wallace, 65.
Crew *v.* Brewer, 19 *ib.*, 70.
Insurance Co. *v.* Folsom, 18 *ib.*, 237.
Town of Ohio *v.* Marcy, *ib.*, 552.

The only question, in our view of the case, which can be considered by this Court, is whether the facts found by the Court below were sufficient to support the judgment.

On this theory, the only question presented by this record to this Court is whether the sums of money borrowed by the plaintiffs below from time to time and temporarily, in the ordinary course of their business, was capital employed in the business of banking so as to be liable to assessment and taxation as such.

POINTS.

First.—The decision of the Court by which the issues were tried without a jury, under the Act of March 3d, 1865, 13 U. S. Stat. at Large, 501, is final and conclusive as to the facts so found. The Bill of Exceptions does not contain any of the evidence taken at the trial, so that no questions in respect to evidence are presented. The

only exceptions taken by the plaintiffs in error were taken subsequent to the decision of the Court, and not during the progress of the trial, so that there is nothing which the Court can review.

Cooper *v.* Omohundro, 19 Wall., 65.

That case decided that the phrase "rulings of the Court during the progress of the trial," does not include findings of the Court, nor the conclusions of the Court embodied therein.

Crew *v.* Brewer, 19 Wall., 70.
Insurance Co. *v.* Folsom, 18 Wall., 237.
Town of Ohio *v.* Marcy, *id.*, 552.

Thus, under the fourth section of the act referred to, the only question which can be reviewed is whether the facts found were sufficient to support the judgment.

Second.—Before considering the question immediately involved in the decision of the Court below, it may be proper to call attention to the amendments to the 79th and 110th sections of the Act of June 30th, 1864, 13 U. S. Statutes at Large, p. 277, contained in the amendatory Act of July 13th, 1866, 14 U. S. Statutes at Large, p. 136; and to the circumstances under which those amendments were adopted.

1.—The Statute under which the tax referred to

was imposed is the 110th section of the Act of June 30th, 1864 [13 U. S. Stat., 277], as amended by the Act of July 13th, 1866 [14 U. S. Stat. at Large, 136], and is in these words:

"* * * and a tax of one twenty-fourth of one per centum each month, as aforesaid, upon the capital of any bank, association, company or corporation, and on the capital employed by any person in the business of banking beyond the average amount invested in United States bonds."

2.—The Court may be assisted in its consideration of the question at issue by a reference to the amendments and changes in the different sections of the Internal Revenue Law and the cause thereof.

In the original act of June 30th, 1864 [13 U. S., 251], the first sub-division of section 79 did not, in express terms, include "Banks," and they were for the first time expressly included in that section by the amendment of July 13th, 1866 [14 U. S. Stat., 136.] The original section was "Bankers using or employing a capital not exceeding $50,000 shall pay $100 for each license." The amended section was "*Banks chartered or organized under a general law with a capital not exceeding* $50,000, and bankers using or employing a capital not exceeding $50,000, shall pay $100 for the special tax," which had been instituted in place of the license fee.

It will thus be seen that "incorporated banks" and "individuals" coming within the

definition of bankers were intentionally placed upon the same footing with respect to the license fee or special tax to be paid, and that in each case the tax is graduated with reference to the *capital* of the bank on the one hand, and the *capital* of the individual on the other.

The original act was amended in another respect, as follows:

The 110th section of the Act of June 30th, 1864 [13 U. S., 277] provided that "$\frac{1}{24}$th of one per cent. should be collected each month upon the *average* amount of the *capital* of any bank, * * * corporation or person engaged in the business of banking, beyond the amount invested in United States bonds."

Under this section the Government claimed that a person engaged in banking was liable to be taxed on his *capital*, notwithstanding that such *capital* was not used in such business. To obviate this difficulty, the 110th section was amended by the act of July 13th, 1866, *supra*, by omitting the words "or persons engaged in the business of banking," where they were used in connection with the words "bank or corporation," so as to provide that the tax payable by a bank or corporation was to be collected on its capital, and then made a special provision that a tax at the like rate should be levied "on the capital employed by any person in the business of banking;" thus again evincing an intention to place individuals and banks on the same footing.

Another amendment to the same 110th Section was also made by the amendatory Act of July 13th, 1866.

That section in the act of June 30th, 1864, provided that the tax should be paid on the *average* amount of the capital of any bank * * * or person engaged in the business of banking, beyond the amount invested in U. S. Bonds.

In the amendatory act, the word "average," where it was found before the word "capital," in the original act, was stricken out, and the same word was inserted before the words "amount in U. S. Bonds," so that by the amendatory act, the tax, whether upon individuals or corporations, was assessed upon their "capital," and not their "average capital," from which the average amount invested in U. S. Bonds was to be deducted.

3.—At the time the Internal Revenue Act was under consideration by Congress, the case of the Mechanics' and Farmers' Bank of the City of Albany against Theodore Townsend had been decided by the late Justice Nelson, and his decision reported in 5 Blatchford's Circuit Court Reports, p. 315.

That case involved the question whether the license fee required to be paid by bankers under the 1st subdivision of the 79th section of the act of June 30th, 1864, (13 U. S. Statutes at Large, 251,) was to be determined with respect to the amount of the capital of such bankers as fixed by law, or whether it was to be guaged

by reference to the amount actually employed by them in the prosecution of their business; and it was held that the term "capital," as used in said section in the case of a bank, (the amount of whose capital was fixed by its charter,) meant the amount of capital so fixed, and did not include the surplus earnings of the bank, so as to subject the bank to a license tax on such surplus earnings as capital, although such surplus earnings were used by the bank in conducting its business.

The amendments contained in the act of July 13th, 1866, were caused in part by the decision to which reference has just been made, and in part also by the claim interposed by the Government, and above referred to, in respect to the amount upon which the individual banker was liable to pay tax; and it is fair to presume that the amendatory act was passed, and the amendments to sections 79 and 110 were adopted, for the purpose of avoiding the recurrence of any similar questions, and of removing an obscurity which certainly did exist in the original act.

The amendments referred to also indicate a clear intention on the part of the Federal Legislature to place individuals engaged in the business of banking, and banks, on the same footing in respect to the amount of the tax to be paid by them, and upon what it was to be paid; and show that the word "capital," as used in reference to banks, and also in reference to persons employed in the business of banking, meant the same thing.

4.—Attention is also called to the 37th section of the Act of June 6th, 1872, 17 U. S. Statutes at Large, p. 256, which contains an express provision that the words "capital employed," as used in the 110th section of the Acts of 1864 and 1866, shall not include money borrowed or received from day to day in the usual course of business, from any person not a partner of or interested in said bank, association or firm.

At the time of the passage of this last-mentioned act, the Government and the class of bankers among whom the plaintiffs below were included, were directly at issue in regard to the very questions now involved in this controversy, and the claim made by the Government, and which is sought to be sustained here, was presented to Congress, and the amendatory Act of 1872 was passed, with full knowledge on the part of Congress of the nature of such claim.

It is fair, therefore, under the circumstances, to regard this Act of 1872 as a declaration on the part of Congress of the construction and meaning of the original act.

Doubtless it is possible to say that such statute may have changed the law; but bearing in mind how easy and appropriate, if that had been the intention, it would have been for Congress to declare that thereafter money so borrowed should not be liable to the tax, it seems to us that, considering the omission of such words, and the peculiar language of the statute itself, and the circumstances under which it was passed, a more fair and reason-

able construction to be given to the law would be to regard it as an act declaratory of the meaning and construction of the original act.

Third.—With regard to the main question involved in the controversy here, considerations present themselves, which make it clear to our minds that moneys borrowed from time to time and temporarily, although used and employed in the ordinary course of business, are not capital within the meaning of the 79th or 110th sections of the acts above referred to.

1. In the first place, if moneys so borrowed from time to time and temporarily are to be considered as capital, and taxable as such, it necessarily follows that the amount of capital upon which the tax is to be paid must vary from day to day. Inasmuch as the amounts borrowed from time to time, and temporarily, must necessarily vary, it needs no argument to show that the aggregate amount of capital of which they form a component part, must also vary, and must depend upon the amounts so borrowed.

   In order, therefore, to enable the Government to ascertain the amount of changing capital upon which such tax is to be estimated, its agents have been obliged to ascertain the average amount of such capital, and in order to do this, the unauthorized

method has been adopted of adding all the sums borrowed during a month, and dividing the aggregage by the number of days in the particular month, and adding this to the amount of fixed capital; thus arriving at what the Government agent terms the average amount of capital, and the monthly tax is based on this average.

It will be seen at once, that if, as claimed by the Government, moneys borrowed from time to time, and temporarily, are to be included in the capital on which the tax is to be levied, there is no other mode of ascertaining such amount than that adopted by the Government.

In doing this, the Government actually interpolate into the 110th Section, as amended by the Act of July 13th, 1866, the word "average" before "amount" of the capital, which was the very word stricken out by that Act; and the Government levy a tax upon the *average* amount of capital employed in the business of banking, in direct violation of the express terms of the 110th section, which provides that the tax shall be paid upon the "amount" of the capital engaged in the business of banking, and not upon the "average amount."

The very fact that, in order to carry out the views of the Government, they are obliged to override an express Act of Congress, and to invent a mode in which the amount on which the assessment is leviable is to be ascertained, goes far to show that Congress never intended to include moneys borrowed from time to

time as capital, or to tax them as such; for had they so intended, they doubtless would have provided some mode of ascertaining the amount, and of making the assessment.

2. By the first subdivision of the 79th Section of the Internal Revenue Law, 14 U. S. Statutes, 115, the banker is required to pay a special tax based on "*the capital employed*," and banks are required to pay special tax on the capital specified in their charter.

The "capital employed by the banker," as well as the capital of the bank or other banking corporation, must be a *fixed* sum, otherwise the amount of the special tax could not be ascertained.

Under the 71st, 72nd, 73rd, and 74th sections of the said Act (14 U. S. Statutes, p. 113), this special tax, which was substituted for the original license fee, is to be paid once a year, when the bank or banker receives the banking license, and the amount is based on capital. This must mean the permanent, fixed capital, and cannot be intended to embrace moneys which may thereafter, and during the course of the year, be borrowed and temporarily used in the business.

The fact that the same 79th section relates to banks, which must have a fixed and permanent capital, as well as to bankers, and that the object is to fix the amount to be paid for a special tax by each, shows that in both cases "the capital" must be and must represent the same thing; and that, in both cases,

it is the amount permanently invested in and at the risk of the business.

3. The word capital in the 110th Section, has the same meaning and refers to the same thing designated as "*capital*" in the 79th Section.

No reason can be assigned why the same word should refer to different things in the two sections.

In the 79th Section, the special tax is gauged *by* the amount of *capital;* in the 110th Section, the tax is *on* the *capital.*

If, in the one case, the capital must be a fixed sum, ascertained and defined at a specified period for the purpose of ascertaining the amount apportioned on which the license fee or special tax is to be paid; so, in the other case, the capital must likewise be a fixed sum, ascertained and defined at the time when the monthly tax is to be paid. (Mechanics' Bank *v.* Townsend, 5 Blatch. C. C. R., 316.)

4. Again, the 110th Section not only applies to bankers, but embraces "banks, associations, and corporations" engaged in the business of banking, and these last are required to pay a tax on the capital.

It is fair to presume that the framers of the law intended, by *capital*, something which is applicable to "banks, associations, and other corporations."

The Legislature did not intend to use the

word "*capital*" in any different sense, when applied to individuals, than when applied to "banks, associations, or corporations."

Capital, when spoken of in reference to a "bank, association or corporation," is well understood, and has a distinct and well-defined meaning. It is that which the shareholders have contributed, or agreed to contribute, to the stock of the *corporation*, which, when so contributed, becomes the *property* of the corporation; is to be at its absolute disposal; and is to be applied and used by it for the purposes of its business of such corporation. It is an amount *permanently* invested by the shareholder—placed at the risk of the enterprise, and to remain in the treasury of the corporation.

Every one understands what is meant by the capital "of a corporation, association, or bank." With regard to these institutions, no one can pretend that money temporarily borrowed for the temporary use of the institution becomes a part of its capital. No one can pretend that moneys received on deposit by such an institution, form or can in any event become a part of its capital. The very fact that Congress have taxed *capital* and *deposits* shows that the two things are different. If deposits form no part of the capital of a "bank, association, or corporation," surely they form no part of the capital of an individual banker. In the case of a corporation, no one can pretend that money borrowed from time to time, or procured in any other manner, to answer the temporary needs of the

bank, forms a part of its capital. How can it be said that such moneys, so borrowed for a like purpose, form any part of the capital of an individual banker? Capital, as used in the act, must therefore mean the same thing when applied to corporations as when applied to a copartnership.

5. The fallacy, even absurdity, of the argument of the other side may be shown by a few plain ilustrations:

a. The pecuniary credit of an individual or firm, as well as of a corporation, depends, in many cases, upon the *capital* invested in the business.

When the credit of such a party is involved, the question is: what capital has he, or what is the capital of the firm or corporation?

Capital is intended, in these instances, to designate the financial strength of the party, firm, or bank.

If borrowed money, not placed at the risk of business—not invested in it—but borrowed to be repaid absolutely and at all events, and borrowed on the security of property pledged for its payment—not only creating a debt, but absorbing a portion of the property and assets of the individual—is to be considered a part of the capital, then capital does not designate financial strength, but indicates financial weakness.

b. A man applying for credit is asked what is the capital of his firm, and he says $100,000 On the faith of the representation, a merchant trusts him.

The same individual offers bimself as surety to the United States on the bond of some official, and in the course of investigation as to his responsibility, he says that he is the member of a firm with the capita of $100,000.

Would the merchant in the one case, or the United States in the other, exonerate such person from a charge of false pretences or perjury, as the case may be, on the ground that his firm from time to time had borrowed money which had been used temporarily in business, and that the average amount of such moneys was not less than $100,000?

c. It might as well be argued that a dry-goods merchant, with a capital of $100,000, which he invests in dry-goods, has increased his capital by the amount or value of the dry-goods purchased, and not paid for.

d. Take the case of the banker who was assessed by the Assessor on a capital of $200,000 under these circumstances.

The banker started in business with $100,000 in bonds, or other securities, worth a little over par; these were his capital; he wished to raise money, and went to a bank and borrowed $100,000 on

them, and kept this loan alive for six or seven weeks. In the meantime, while the loan was alive, the Assessor demands the monthly return. The banker returns his capital, $100,000. The Assessor claims that the capital is $200,000, and assesses accordingly.

The banker is said to have doubled his capital, because he borrowed $100,000 on that which originally represented a capital of $100,000.

If he had sold the bonds for $100,000 he would have had nothing but the proceeds. If, instead of selling them, he borrows on them, has he increased his capital?

He has not any more than $100,000, but still he must pay a tax on $200,0 0. Why? Because, says the Assessor, the first $100,-000, in bonds, was the original capital, and on that he has raised another $100,000, and thereby he has to that extent increased his capital.

6. On the theory that moneys so borrowed are capital, it requires but little consideration to see that the same amount of money, or item of property, may be taxed several times in the hands of different individuals, as representing different taxable interests.

The money pays a tax in the place of original deposit, and is included as a part of the deposit of the bank where it is kept.

One hundred thousand dollars are drawn from the bank by A., who loans them to B. on $100,000 of bonds. Of these $100,000, B.

loans to C. and other bankers in different sums; B. pays on the whole $100,000, as a part of his capital employed in the business of banking, and each of the other bankers to whom B. has loaned pay on their portion of the same money, while, at the same time, A., who originally had the $100,000, pays a tax on that—it being included in his capital.

In addition to this the bonds, which really was all the capital he had, and on which he must still pay tax, as it was the original capital on which his license fee is based, have passed into the hands of A., who in turn has borrowed money on them, and the money so borrowed is a part of his capital, and the money is again taxed as capital in the hands of other parties to whom it is subsequently loaned—and so on without end.

7. The injustice and unreasonableness of the construction of the revenue authorities may be exemplified by actual occurrences. A. directs B. to buy $100,000 of stock; B. buys them and pays for them, and delivers them to A., who pays B. for them. Here the Assessor does not claim that there is any increase of the capital of B. But, in the same case, if A., when he gave the order, leaves with B. in part payment $10,000, and B., not having the money himself to pay for the stock, pledges the stock with a bank and borrows $90,000 on it for the benefit of A., but in his own name, and uses that money to pay for the stock, it is claimed that B. has increased his

capital $90,000, and this notwithstanding B. has neither the money nor stock—the money having been paid for the stock and the stock having been hypothecated to borrow the money.

8. The amount claimed by the Government to be capital, embraces all money borrowed by Clark, Dodge & Co. from all sources, including as well all which they may have borrowed from time to time on the original capital, so that they not only pay on their original fixed capital, but they pay on every dollar which, in the course of the year, they may have raised from day to day, or from hour to hour, on the very capital itself; and in this manner, as the securities forming their capital may have been, and doubtless were, used as the means of raising money for the concern almost daily, it would follow that they have paid a tax on their capital as many times as those securities were used in obtaining money.

9. The hardship as well as injustice of the construction placed by the revenue authorities on the sections of the law in question, if not made apparent by what has been above stated, will, we have no doubt, be made clear by carrying out the line of thought above suggested.

10. Before leaving this subject, it may not be improper to call attention to the fact, that Clark, Dodge & Co., and all other persons en-

gaged in like business, are taxable both as bankers and brokers, and that by the Act of 1866 they pay not only their special license tax under the 79th section, as bankers, but also their stamp tax on all sales, their stamp tax on all time contracts under the 110th section, and that, until Congress passed the Act of June 6th, 1872, before mentioned, which provided that the words "capital employed" should not include money borrowed or received from day to day in the usual course of business, they were in addition liable to pay the tax now claimed on the money used by them in carrying out the very sales and contracts on which they were already taxed, on the theory that such money was capital employed in the business of banking.

In the following opinion of Judge Woodruff, who decided the cause in the Court below, our views on the question under discussion are presented with great clearness, and it would be a waste of time to repeat the argument therein contained:

WOODRUFF, *Circuit J.:*

1. I am of opinion, that at the respective times when the taxes were imposed and collected, for recovering back which the plaintiffs in the first action, Clark, Dodge & Co., bring their action, they were bankers doing b isiness as such within the definition given in the Acts of Congress (13 Statutes at Large, 251, § 79; 14 Ib., 115, Sub. Div. 1). Besides their business of purchasing stocks, advancing money therefor, and, in the language of those engaged in such

business, "carrying them on a margin," they had "a place of business where credits were issued by the deposit of money, * * subject to be paid upon draft, check, or order."

Whether the mere business of buying, carrying, and selling stocks for others on the deposit of money or property as a "margin" for their security, would come within the definition in the statute describing bankers, and, therefore, whether the plaintiffs, Frank Work & Co., in the second suit are or are not bankers, the conclusion I have formed on the point next to be stated renders it unnecessary to determine. They did no other business.

2. I am of opinion that the terms of section 110 of the act of 1866 (13 Stat. at Large, 277—14 Ib., 136), declaring that there shall be levied, collected, and paid "a tax of one twenty-fourth of one per centum each month * * * upon the capital of any bank, association, company, or corporation, and on the capital employed by any person in the business of banking, beyond the average amount invested in United States bonds," do not authorize nor justify the levy or collection of a tax of one twenty-fourth of one per centum upon money borrowed in the ordinary course of business by a copartnership firm engaged in the business of banking.

The term "capital" in the statute has its ordinary signification, as universally used in trade, commerce, manufacturing, and other specific business.

It is that stock in trade which, irrespective of particular transactions or dealings, constitutes the basis of credit, or the fund belonging to the person, invested in the business.

It is money or property appropriated to the purposes of the business of a person or firm analogous

to the capital in a corporation derived or derivable from the contributions of stockholders and denominated capital stock.

Under the Act of 1864 there was some uncertainty in the application of the terms used, when applied to a mere individual or firm. By the 110th Section of that act (13th Statutes at Large, p. 277), the tax was directed to be levied each month, "upon the average amount of the capital of any bank, association, company or corporation, or person engaged in the business of banking, beyond the amount invested in United States bonds."

When a person was found engaged in the business of banking, it was not clear that as he answered the description in the statute, the tax was not to be levied on all of his capital, however invested or employed. The same individual or firm might be engaged in the business of banking and at the same time have capital employed in manufacturing or otherwise.

In a comprehensive sense, his or their capital would embrace all; and it might, perhaps, not be permitted to hold that the capital to be taxed was, under that statute, only such part of his capital as was employed in banking.

The act of 1866 removed this doubt. Where an individual or firm appropriated a portion of his or their capital to manufacturing or other distinct business, and another portion to the business of banking, this statute of 1866 made a discrimination and confined the tax to the latter.

So it might often be true of an individual, that in reliance upon his known wealth he commenced and carried on a large business as a banker, when the largest portion of that wealth was invested in real

estate. In popular sense such a man is called a "capitalist," defined to be usually a man of large property, which is or may be employed in business under the act of 1864.

What was the capital of such person? It was not easy to say, unless by construction it were held to mean, what the act of 1866 makes it mean, the capital employed in the business of banking—*i. e.*, such portion of his wealth as he might either at the beginning or from time to time withdraw from other investment, or other uses, and employ either in the form of money or securities or property, for the carrying on of his business as a banker.

In the case of a copartnership, the meaning of the term capital is very closely analogous to the same term applied to a corporation. It is the capital stock or stock in trade.

It is the basis of the joint adventures, the contribution of the several copartners,—a ground upon which, in general, distribution of profits proceeds in whole or in part. The plaintiffs in each of the cases are a copartnership firm, having a capital contributed, in money or property, to the use of the joint business. In a supposable case, such capital may not be limited to the original contribution, nor even to any definite sum named in articles of copartnership, but may include successive further contributions or advances by the partners, for the purposes of such business. On that possible case it is, however, not material to dwell, as nothing in these cases raises such a question. It is suggested in order to avoid a different inference from what it is intended to hold. So, also, in a supposable case, the capital of a firm may consist in part or even in

whole of money or property borrowed, to be employed as capital, as the basis of the financial reputation and credit of a firm, and as between the lender and the creditors of the firm, to be at the risk of the business. No doubt a member of a copartnership often borrows a portion, and sometimes the whole of his contribution to the capital stock from personal friends.

It may be lent for the very purpose of such contribution, and so become in every sense a part of the capital or stock-in-trade. No doubt all of the members of a co-partnership, and even the firm in its joint capacity, may procure such special advances to be placed as between the lenders and the co-partnership creditors at the risk of the business, as the basis of co-partnership credit, and to constitute the fund to which creditors may look as their security before the lender is permitted to withdraw it. This suggestion is also made in order to exclude the contrary inference, and not because any such state of facts exists in these cases.

It is not according to the ordinary use of language, and, as I think, not according to any proper use of language to say, of a mercantile firm, that every discount which they procure at bank is so much added to their capital, and yet if they buy goods with the proceeds they use such proceeds in their business.

It would not satisfy the demands of common honesty if a man engaged in business of any kind, being asked the amount of capital employed in his business, should include in his reply all the sums which, in the conduct of his business, he had borrowed and had not yet repaid.

When the debts of a co-partnership are paid what

remains is capital, or capital and profits, as the case may be.

The argument in support of the tax on money borrowed in the ordinary course of the business, assumes that "capital employed by any person in the business," means precisely what "the money or property employed by any person in the business" would mean, and so it includes all money however derived.

This begs the whole question, it deprives the word capital of any distinctive meaning. It withdraws it from its intimate association with the other part of the sentence, and the meaning of the same word capital there applied to an association or "company."

It overlooks the consideration that no reason exists why a co-partnership should pay this tax on borrowed money when an association or company (not necessarily incorporated) in any other form should not. It would give to the term "capital," a new and unusual meaning. It would make every bank discount an addition to capital.

The statute does not so read; it would have been easy, very easy, to say so in terms if Congress had so intended.

It is not an insignificant circumstance that in 1872 Congress expressly enacted that the words "capital employed" in said 110th section "shall not include money borrowed or received from day to day, in the usual course of business, from any person not a partner of or interested in the said bank, association or firm" (17 Statutes at Large, 256). It is possible to say that this statute changed the law; but it seems to me that the language is better adapted to declare the construction and meaning of

the law. It would have been easy and appropriate, if that alone was the design, to say that hereafter money so borrowed shall not be liable to the tax.

My opinion that the terms employed did not include money so borrowed renders it unnecessary to do more than say that this further enactment is not inconsistent with that view, and may well have been passed in order to remove any doubt theretofore entertained on the subject.

I have not overlooked the suggestion in behalf of the defendant that this construction of the statute enables persons having a very small capital to carry on a very large business of the kind now in question—buying stocks on commission, "carrying" them, by borrowing thereon the amount required to pay for them, and selling them when directed by the customer, and paying the loan without paying the specified tax on the money used for the purpose. This may be so. I do not know how large a capital may be necessary to the establishment of such a financial credit as will secure to a person or a firm a large patronage from stock dealers or speculators. But the answer is that the statute does not declare money borrowed for the purposes of the ordinary and daily conduct of the business taxable. Had it been intended to tax such money, it was easy to say so. If the evil urged required remedy, it was easy to correct it, and it was for the Legislature to correct; and it is not for the Courts to give a forced and unnatural meaning to language for that purpose.

The result of these considerations is that the tax levied and collected from these plaintiffs in both cases was illegal, and the necessary preliminary proceedings, protest, appeal and suit, in due season

having, as admitted, been taken by them, they are entitled to recover.

3. As to the firm of Clark, Dodge & Company, the plaintiffs in the first named case, I am of opinion that they were liable to the tax levied and collected each month upon the average amount of the deposit of money, subject to the payment by check or draft; that they received such deposits in their business is distinctly proved, and the amounts are shown entirely distinct from moneys borrowed in the statements put in evidence.

The circumstance that they allowed and paid their depositors interest at some agreed rate does not affect this question. The same is done in favor of depositors by very many duly incorporated banks in this city and elsewhere. But securities or money left with either of the above plaintiffs as a pledge for their indemnity to save them from loss, on purchasing or selling stocks for the customers, are not of this character.

They are not "moneys subject to payment by check or draft" in any just sense of those terms, as applied to moneys deposited with a bank or banker."

Fourth.—Since the preparation of the foregoing points, we have examined the brief filed by the Attorney-General on behalf of the plaintiffs in error, and in reply to the suggestions therein, we say:

1. That the question sought to be raised for the first time, viz., that the fund on which the tax was levied, if not taxable as capital, was taxable *as deposits*, is not in the case. No such point was made in the Court below, and there is no ruling, decision or exception to any ruling or decision of the Court below which raises that point or justifies its discussion here.

   See our first point, *ante*, page 5, and authorities.

   St. Louis *v.* Ferry Co., 11 Wallace, 428.

2. The claim now made is inconsistent with the only claim which was made at the trial, and which is found by the Court to have been made. The record, fol. 23, states "and that said assessor insisted * * that all moneys borrowed by said plaintiffs from time to time and temporarily, in the ordinary course of their business, formed a part of the *capital* of the said plaintiffs employed in the business of banking * * * * and assessed them as a part of the *capital* employed by the plaintiffs in the business of banking."

   So, also, the only conclusion of law found by the Court on this point is the first—folio 27 of the record—which holds that these moneys are not *capital*.

   The only exception taken by the plaintiff

in error is at folio 20 of the record, and is as follows:

"Defendants' counsel moved the Court, *on the facts so found*, that judgment be entered for defendants," * * and the Court denied said motion of defendants' counsel, and defendants' counsel duly excepted. The motion for judgment was therefore made on "*the facts so found*," and these are stated at folio 19 to be "the facts set forth in the findings thereinafter stated;" and these findings (second and third findings, folios 23–24–26) show that the only fact found in regard to the assessment was that these moneys were assessed as *capital* and not otherwise.

3. In point of fact, these same moneys were assessed and taxed as *deposits*, and also as *capital*. The record does not purport to contain the evidence introduced on the trial which would have shown such to be the case. Nor does the record show that these moneys were not taxed as deposits. In this condition of things, the Court will not presume that the moneys were not taxed as deposits if properly liable to be taxed as such, but, on the contrary, will presume that they were so taxed. They will presume this, if necessary, not only on the ground that public officers will be presumed to do their duty, but also on the principle well established that on appeal the Appellate Court will, in the absence of any express finding to

the contrary, presume every fact necessary to sustain the judgment, and nothing against it.

Grant *v.* Morse, 22 New York Rep., 323.
Carman *v.* Pultz, 21 *ib.*, 547.
Smith *v.* Coe, 29 *ib.*, 666.

And there is still another rule which makes against the plaintiff in error on this point, and that is, that it was the duty of the collector, when sued for this money, to show affirmatively upon what ground he took it; and to prove the due performance of all acts necessary to support the rights he asserts. The rule as laid down is: "When an officer or party is in the attitude of asserting rights founded on official acts, and when due performance is essential to the right, due performance must be proved, and cannot be presumed (Phillips' Ev., Edwards' ed., and Cow. and Hill's notes, 813, 814; *id.*, 604, 605)," 4 Lansing, 84.

4. Even if the question were directly presented, we submit that "moneys borrowed from time to time temporarily in the ordinary and usual course of their business," do not constitute "*deposits*," within the meaning of the 110th section of the Act of June 30, 1864, as amended by the Act of July 13, 1866 (14 U. S. Stat at Large, p. 136).

That section applies to banks and banking corporations, thus showing that bankers and banks were placed in the same category.

That section speaks of "deposits of money subject to payment by check or draft, or represented by certificates of deposit or otherwise." This does not mean money which a

banker borrows to pay his debts, or to carry on his business, but means moneys *deposited* with him by other people in the same manner as money is deposited in a bank, and which the depositor is entitled to draw out on check or draft, or for which the bank gives a certificate of deposit or other voucher. The difference between such money and those in question seems too clear for argument.

5. With regard to the suggestion made by the Attorney-General, that capital is none the less capital because it is borrowed, we concede that; but that is not the question here. The question here is whether money borrowed to-day and returned to-morrow to meet a temporary emergency is "*capital*" at all. There is no doubt that the permanent and fixed capital of a banker is taxable as "capital," and that being so, it is immaterial how or in what manner the banker procured it. The fact that capital may be borrowed does not prove that all moneys borrowed are capital, and we make no advance toward a solution of the question involved in this case by speaking of "borrowed capital," or showing that capital may be borrowed. The question for this Court to determine is whether these moneys in question are "*capital*," and, with great confidence, we submit that they are not.

Fifth.—We submit that the judgment should be affirmed.

JOHN E. BURRILL,
Of Counsel for Defendants in Error.